

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEW JERSEY TRANSIT CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
AMERICAN PREMIER UNDERWRITERS,	:	
INC., et al.	:	No. 05-cv-06614-JF

MEMORANDUM AND ORDER

FULLAM, Sr. J.

October 19, 2006

Plaintiff, New Jersey Transit Corporation, an instrumentality of the State of New Jersey, is the present owner of the South Amboy rail yard. For many years, rail operations on the property were conducted by Penn Central Transportation Company or its predecessors. In 1976, all such rail operations were transferred to Conrail, and, in 1982, plaintiff acquired the property and its operations.

The South Amboy Yard became contaminated with PCBs as a result of the rail operations conducted on the property. In 1991, as a result of an enforcement action brought by the United States Environmental Protection Agency against plaintiff, plaintiff agreed to investigate the site for possible contaminants, and, on or about April 23, 1992, plaintiff entered into a Memorandum of Agreement with the New Jersey Department of Environmental Protection for the cleanup of the facility. The cleanup is continuing. Plaintiff alleges that, as of November

2004, plaintiff had expended approximately \$2.8 million in its remediation efforts.

On December 29, 2004, plaintiff filed this lawsuit in the United States District Court for the District of New Jersey, seeking to impose liability upon American Premier Underwriters (the reorganized successor of Penn Central Transportation Company), Conrail, and various John Doe defendants. Plaintiff asserted a wide variety of claims invoking the CERCLA statute, various New Jersey statutes, and theories of strict liability, public nuisance, etc. Two counts of the complaint, Counts XIII and XIV, asserted claims which are within the exclusive jurisdiction of this court because they involve interpretation and application of the final consummation order in the Penn Central bankruptcy proceeding. On November 23, 2005, the New Jersey District Court entered an order severing those two counts, and transferring them to this court for disposition. The defendant American Premier Underwriters has filed a motion to dismiss these counts.

The claims now being considered are predicated upon the fact that, when Penn Central was conducting rail operations at the site, it was doing so pursuant to certain Operating Agreements between Penn Central and the plaintiff or its predecessors, and plaintiff asserts that these Operating Agreements required Penn Central to indemnify and save harmless

the plaintiff (or its predecessors) from all liability attributable to Penn Central's rail operations at the site. For present purposes, it will be assumed that the Operating Agreements required Penn Central to indemnify plaintiff against damages attributable to PCB contamination. The issue to be decided, therefore, is whether the defendant American Premier Underwriters can be held liable under these contracts, or whether, as it contends, the Consummation Order in the Penn Central reorganization proceeding discharged all such contractual claims. The language of the Consummation Order provides a clear answer to that question:

Section 3.06 of the Consummation Order provides:

"The Debtors and the Trustees of the properties of the Debtors shall, as of the consummation date, be discharged and released forever from:

- (a) All obligations, debts, liabilities and claims against any of the debtors, whether or not filed or presented, whether or not approved, acknowledged or allowed in these proceedings and whether or not provable in bankruptcy."

Moreover, all parties (including the present plaintiff) were enjoined from seeking to enforce any claims against the Debtor or the reorganized company relating to pre-consummation conduct, without first obtaining permission from the Reorganization Court.

By including Counts XIII and XIV in the complaint in this action, plaintiff appears to have violated that injunction.

It should also be noted that, upon termination of Penn Central's rail operations, the Operating Agreements were assigned to and became the obligation of Conrail. The obligations imposed by these Operating Agreements were certainly not assumed by the reorganized company; in the opinion approving the proposed Plan of Reorganization for submission to the votes of creditor groups, it was noted that, since Conrail was taking over Operating Agreements of this type, the result was equivalent to a rejection of executory contracts, with an absence of damages occasioned by the rejection.

The defendant also contends that plaintiff's claims asserted in Counts XIII and XIV are time-barred. I agree. Plaintiff has known of the basis for its claims for indemnification since 1991 or 1992, but did not file this action until December 2004.

I express no view as to whether the other counts of plaintiff's complaint are meritorious. That is a matter for the New Jersey District Court. I hold merely that no liability can be imposed because of the indemnification provision in the Operating Agreements. Counts XIII and XIV must be dismissed.

An Order follows.

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ORDER

AND NOW, this 19<sup>th</sup> day of October 2006, upon consideration of the motion of defendant American Premier Underwriters, Inc. to dismiss Counts XIII and XIV of plaintiff's complaint, and plaintiff's response, IT IS ORDERED:

1. The defendant's motion is GRANTED.
2. Counts XIII and XIV of plaintiff's complaint are dismissed with prejudice.
3. The Clerk is directed to close the file.

BY THE COURT:

/s/ John P. Fullam  
John P. Fullam, Sr. J.